United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7478

United States Court of Appeals

FOR THE SECOND CIRCUIT

RANDALL BLACK *et al.*,

Plaintiffs-Appellants,

—against—

ABRAHAM BEAME *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF for DEFENDANT-APPELLEE MONSIGNOR EDMUND F. FOGARTY

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BRIEF FOR DEFENDANT-APPELLEE
MONSIGNOR EDMUND F. FOGARTY

This brief is respectfully submitted on behalf of appellee Monsignor Edmund F. Fogarty in support of Judge Pollack's dismissal of the complaint as against him in the District Court. Monsignor Fogarty was named as a defendant in the complaint both individually and in his capacity as "Administrator"* of the Mission of the Immaculate Virgin ("Mission"), a privately-owned, authorized non-profit child-care

* Monsignor Fogarty's actual title is Executive Director.

agency* to which the City of New York referred plaintiffs Randall and Greta Black for foster care in 1971 and plaintiffs Corrine and Joseph Black for foster care in 1972.

ISSUE PRESENTED

Whether the executive director of a foster-care agency, to which children have been duly referred pursuant to contract by the City of New York, has any federal constitutional or statutory obligation to assist the mother of those children in solving the economic and housing difficulties which resulted in her voluntary placement of the children with the City for foster care.

COUNTER-STATEMENT OF THE CASE

This was alleged to be a civil rights action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201-02 to protect and redress rights guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution, Titles IV and XX of the Social Security

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* Also named as defendants were certain fictitious persons identified as "Jane or John Hoe" and "Jane or John Joe", who were alleged to be "casework supervisors" or "caseworkers" employed by the Mission, but such persons have not been further identified or served with process.

Act, 42 U.S.C. §§601 et seq. and 1397 and New York state law.

The plaintiffs-appellants are the nine children of a Mrs. Frances Black. Other than Monsignor Fogarty, the defendants-appellees are officials of the City or State of New York or of the New York Housing Authority.*

The complaint alleged, among other things, that the defendants denied the plaintiffs services in their home in order to keep them together as a family (para. 31, JA, p. A-11); failed to provide the four above-mentioned plaintiffs with services necessary for them to leave the Mission and be reunited with their mother and siblings (para. 32, JA, p. A-12); and harassed the plaintiffs' mother in her attempts to secure adequate public assistance and housing for the plaintiffs (para. 33, JA, p. A-12). The complaint did not allege specifically the ways in which Monsignor Fogarty unlawfully denied such services, nor did it specify the relief sought against him as opposed to the defendant

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* See paragraphs 13 through 24 of the complaint, set forth at pages A-6 through A-9 of the Joint Appendix [hereinafter cited as "JA"], for the names and alleged functions of the defendants-appellees in addition to Mayor Beame.

public officials. The complaint did allege, at paragraphs 42-45*, that the plaintiffs' mother voluntarily placed the four plaintiffs named above with the City for foster care, that no efforts were made on the part of the defendants to avoid such placement or to maintain contact with the rest of the family after referral to the Mission and that the four children desire to be reunited with their natural family.

The defendant public officials filed motions to dismiss the complaint variously on the grounds of lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted and absence of an indispensable party. Monsignor Fogarty joined in the motions.

On August 30, 1976, Judge Pollack granted the motions in a thorough opinion** reported at 419 F.Supp. 599 in which he ordered the complaint dismissed in its entirety as to all defendants.

Judge Pollack stated the issue as follows:

> . . . The Court's function . . . is not to test the bonds between the members of the Black family, but to determine if anything in the Constitution requires the state to

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* JA, pp. A-14 to A-15.

** JA, pp. A-67 to A-95.

> affirmatively maintain those bonds by providing the Black family with any benefits other than what they already receive. 419 F.Supp. at 605; JA, p. A-81.

Relying on Judge Weinfeld's recent decision in Child v. Beame, 412 F.Supp. 593 (S.D.N.Y. 1976), Judge Pollack held that it is not

> proper to reason that because a safe and decent home is an important component of family life the right to housing is a fundamental, constitutionally-protected right. 419 F.Supp. at 606; JA, p. A-81.

Further:

> There is no constitutional obligation on the state either to provide plaintiffs with welfare or housing benefits or to affirmatively insure a given type of family life, and none may be created by inference and misdirection through the penumbral constitutional right to familial privacy. Though this Court has the power to insure that no state agency improperly interfere in the Black's family life, see Stanley v. Illinois, 405 U.S. 645 (1972), it does not have the power to enforce the laudable sociological view of the importance of the family held by plaintiffs and their next friends. Plaintiffs would have the word "interfere" mean too much. A proper reading of the Constitution cannot include such semantic leaps. However much this Court may share plaintiffs' beliefs concerning the present distribution of the state's largesse, it is not empowered to enforce those views without a constitutional basis. There is no such basis here. 419 F.Supp. at 607; JA, pp. A-85 to A-86 (emphasis in original).

The court below also dismissed the plaintiffs' claims that they have been subjected to cruel

and unusual punishment within the meaning of the Eighth Amendment,* that the defendants have harassed and humiliated their mother** and that the court had pendent jurisdiction over their statutory claims.***

ARGUMENT

POINT I

The Constitution Does Not Guarantee A Home to Suit Personal Predilections

Monsignor Fogarty sought to avoid burdening the District Court with arguments duplicative of those so cogently made by the defendant public officials.**** Such a position is equally appropriate in this Court. Thus, Monsignor Fogarty joins in the arguments of the other appellees--to the extent they are not inconsistent with his different relation to this case.

The appellants' primary issue on appeal is stated to be that "state and city officials must first

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* See 419 F.Supp. at 607-08; JA, p. A-87.

** See 419 F.Supp. at 608-09; JA, pp. A-88 to A-94.

*** See 419 F.Supp. at 609-10; JA, pp. A-94 to A-95.

**** See Affidavit of Alfred E. Schretter in support of motion to dismiss complaint, JA, p. A-45.

explore less restrictive alternatives before providing child welfare services in a manner which predictably and severely impinges upon plaintiffs' constitutionally protected right to family integrity." Appellants' Brief, p. 2.

If this is the fundamental issue, it is disposed of, as Judge Pollack correctly pointed out, by the Supreme Court's decision in Dandridge v. Williams, 397 U.S. 471 (1970). In that case, it was argued that Maryland's administration of its federal Aid-to-Families-With-Dependent-Children (AFDC)* program, which limited the amount of money any single household could receive, contravened a basic purpose of the federal law by encouraging the parents of large families to "farm out" their children to others whose welfare grants were not yet subject to the maximum limitation. 397 U.S. at 477.

In rejecting the contention, the Court noted that the "federal law gives each State great latitude in dispensing its available funds." 397 U.S. at 478.

> The States must respond to this federal statutory concern for preserving children in a family environment. Given Maryland's finite

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* 42 U.S.C. §601 et seq., the same statute relied on by the appellants here.

> resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family. We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families--because of the inherent economies of scale--to accommodate their needs to diminished per capita payments. The strong policy of the statute in favor of preserving family units does not prevent a State from sustaining as many families as it can, and providing the largest families somewhat less than their ascertained per capita standard of need. Nor does the maximum grant system necessitate the dissolution of family bonds. For even if a parent should be inclined to increase his per capita family income by sending a child away, the federal law requires that the child, to be eligible for AFDC payments, must live with one of several enumerated relatives. The kinship tie may be attenuated but it cannot be destroyed. 397 U.S. at 479-80 (footnotes omitted).

In rejecting the AFDC recipients' constitutional claims, the Court expressly pointed out that state regulation in the social and economic field of the type under review herein does not affect freedoms guaranteed by the Bill of Rights. See 397 U.S. at 484. The Court concluded its opinion as follows:

> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly the one before us. But the intractable economic, social, and even philosophical problems presented by

> public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, [397 U.S]. 254. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. Steward Mach. Co. v. Davis, 301 U.S. 548, 584-585; Helvering v. Davis, 301 U.S. 619, 644.*

The "catalogue of judicial opinions"** presented by the appellants as Part I of their brief does not answer, as indeed it cannot, the Supreme Court's (and Judge Pollack's) ruling that the constitutional standards attendant to rights guaranteed by the first ten amendments to the constitution do not apply to claims such as those herein.

Appellants argue at page 15 of their brief that the "case upon which the district court should have relied, but which it expressly rejected, is Shelton v. Tucker, 364 U.S. 479 (1960)." But it is exactly this case which the Supreme Court distinguished in Dandridge*** and which Judge Pollack, properly, therefore recognized as inapposite herein.****

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* 397 U.S. at 487.

** Appellants' Brief, p. 21.

*** See 397 U.S. at 484.

**** Compare 419 F.Supp. at 606; JA, p. A-84 with 419 F.Supp. at 607; JA, p. A-85.

In the string of cases comprising appellants' main point of argument, only one decision of this Court is cited, namely, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974).* But that case involved incarceration of pre-trial detainees in the Tombs, "a fortress in bedlam"**, hardly the situation in which the appellants find themselves. On this point, Judge Pollack relied on Judge Weinfeld's discernment of the distinction in Child v. Beame, to wit:

> The attempt to equate the child plaintiffs' status while in the foster care of the state with those who are taken in custody under a civil [or criminal] commitment . . . is somewhat farfetched. The civilly [or criminally] committed have been deprived of their liberty by the state while the state's action in taking the child plaintiffs into foster care, whether with an institution or foster parent, is not a deprivation of liberty. The state has merely provided a home for them in substitution for the one the parents failed to provide.***

In sum, the constitutional insufficiency of appellants' contention has been perhaps best summarized in Lindsey v. Normet, 405 U.S. 56, 74 (1972), in which the Supreme Court, in failing to perceive any constitutional guarantee of access to dwellings of a particular

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* See Appellants' Brief, p. 20.

** 507 F.2d at 336.

*** 412 F.Supp. at 608. See 419 F.Supp. at 607; JA, p. A-85.

quality, stated simply that "the Constitution does not provide judicial remedies for every economic and social ill."

POINT II

There Is No Case or Controversy Between Appellants and Monsignor Fogarty

A second, obvious infirmity herein is the fact that there is no case or controversy between appellants and Monsignor Fogarty (and the Mission).

This, of course, is the reason for the absence of any express claims against them in the complaint. The Prayer for Relief does not state the relief sought as against Monsignor Fogarty. It does not ask that he be required to provide specified services that he has failed to provide, nor does it ask that he be enjoined from doing something which he is currently doing. The complaint is totally silent as to what Monsignor Fogarty should do in addition to what he is now doing, and has been doing for many years, namely, providing quality care for children voluntarily placed with the City of New York and referred to the Mission for foster care pursuant to contract. Furthermore, appellants' effort to try this case on appeal by appended

affidavit to their brief also does not specify services to be performed by Monsignor Fogarty.

If appellants were injured when placed with the City for foster care, albeit voluntarily by their own mother, or if their family has been injured through unlawful denial of appropriate unitary housing, such injuries were not and could not have been perpetrated by Monsignor Fogarty and the Mission: For administration of the procedures under review rightfully rests in the hands of others--the public officials.*

It hardly need be restated that a case or controversy within the meaning of Article III, Section 2 of the constitution requires some form of injury or harm caused one party by another. See generally Baker v. Carr, 369 U.S. 186 (1962). The Supreme Court has always held that a plaintiff must allege and prove some injury in order to raise an "actual controversy", constitutional or otherwise, subject to adjudication in federal court. E.g., Rizzo v. Goode, 423 U.S. 362 (1976); United States

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* Despite the allegation in paragraph 46 of the complaint [JA, p. A-15] that a Family Court judge directed not only several of these officials, but also Monsignor Fogarty, to assist Mrs. Black in finding suitable housing, there is no constitutional or statutory obligation upon Monsignor Fogarty to attempt to render such assistance, assuming he (or the Mission) were practically capable of doing so in the first place.

v. Richardson, 418 U.S. 166 (1974); DeFunis v. Odegaard, 416 U.S. 312 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Sierra Club v. Morton, 405 U.S. 727 (1972); Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). In short, a "controversy" within the meaning of Article III of the constitution is one which "touch[es] the legal relations of the parties having adverse legal interests", involving "an adversary proceeding upon the facts alleged." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (emphasis added).

The nature of Judge Pollack's decision below, in which he originally determined that most of the plaintiffs' allegations were "presently fit for resolution"*, did not require that he determine whether a case or controversy actually existed between plaintiffs and Monsignor Fogarty, nor was he expressly asked to do so by Monsignor Fogarty. However, insofar as "division of a family"** was the injury upon which the court reached the substantive claims, it was not and could not have been even arguably caused by Monsignor Fogarty and the Mission.

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* 419 F.Supp. at 604; JA, p. A-76.

** 419 F.Supp. at 604; JA, p. A-75.

CONCLUSION

In view of the foregoing, it is submitted that the order dismissing the complaint in the District Court should be affirmed.

Dated: New York, New York
December 31, 1976

Respectfully submitted,

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STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

TIBOR E. BANHEGYI being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides in the City of New York State of N.Y. On 3rd January, 1977 deponent served a copy of Brief for Defendant-Appellee Mayor Edward F. FOGARTY

upon:

1) Marcia Robinson Lowry, Esq
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N.Y. City

attorney(s) for party(s) in this action, at the address(es) designated by said attorney(s) for that purpose by:

MAIL [X] depositing a true copy(s) of the same securely enclosed in post-paid wrappers in a Post Office Box regularly maintained by the United States Postal Service at No. 1 Chase Manhattan Plaza, in the City and County of New York, directed to said attorney(s) at the address(es) set out under ~~the~~ name(s); ~~the~~ being the address(es) within the state designated by ~~him~~ for that purpose in the preceding papers in this action.

LETTER DROP [ ] depositing a true copy of the same, enclosed in a sealed wrapper directed to said attorney(s), in the letter drop or box of, and accessible from without, of said attorney(s) office at the address(es) set out under the name: and that said office was not open at the time of service.

PERSON IN CHARGE [ ] delivering a copy of the same to and leaving the same with the person in charge of said office, said attorney(s) being absent therefrom at the time of said service.

Sworn to before me this
3rd day of January, 1977

William J. Lind

WILLIAM J. LIND, Notary Public
State of New York, No. 41-7555730
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1978

T. Bor E. Banhegyi